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OFFICER FORESBERG, et al,
Defendants.

SCREENING ORDER & REPORT & RECOMMENDATION

I. *In Forma Pauperis* Application

II. Jurisdiction

Pursuant to 28 U.S.C. § 1331, federal district courts have original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” “A case ‘arises under’ federal law either where federal law creates the cause of action or where the vindication of a right under state law necessarily turn[s] on some construction of federal law.” *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (internal quotations and citations omitted). The presence or absence of federal-question jurisdiction is governed by the “well-pleaded complaint rule.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under the well-pleaded complaint rule, “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Id.* As explained below, Plaintiff alleges a civil rights

1 violation under 42 U.S.C. § 1983. A claim under this statute invokes the Court’s federal question
2 jurisdiction.

3 **III. Screening the Complaint**

4 Federal courts must conduct a preliminary screening in any civil case “in which a prisoner
5 seeks redress from a governmental entity or officer or employee of a governmental entity.” 28
6 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any
7 claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
8 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1),(2). In
9 addition to the screening requirements under § 1915A, under the Prison Litigation Reform Act, the
10 court must dismiss the case if “the allegation of poverty is untrue” or if the court determines the
11 action “is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks
12 monetary relief against a defendant who is immune from such relief.” *Id.* § 1915(e)(2).

13 Dismissal for failure to state a claim under § 1915A incorporates the standard for failure to
14 state a claim under Federal Rule of Civil Procedure 12(b)(6). *Nordstrom v. Ryan*, 762 F.3d 903, 908
15 (9th Cir. 2014). To survive § 1915A review, a complaint must “contain sufficient factual matter,
16 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (quoting *Ashcroft v. Iqbal*,
17 556 U.S. 662, 678 (2009)). The court liberally construes pro se civil rights complaints and may only
18 dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his
19 claim which would entitle him to relief.” *Id.* (quoting *Iqbal*, 556 U.S. at 678).

20 In considering whether the complaint is sufficient to state a claim, all allegations of material
21 fact are taken as true and construed in the light most favorable to the plaintiff. *Wyler Summit P’ship*
22 *v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the
23 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
24 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
25 A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is clear the
26 complaint’s deficiencies could not be cured through amendment, a pro se plaintiff should be given
27 leave to amend the complaint with notice regarding the complaint’s deficiencies. *Cato v. United*

1 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

2 **IV. Plaintiff's Claims**

3 Plaintiff's complaint describes an encounter between he and members of the North Las Vegas
4 Police Department (NLVPD). (Compl. (ECF No. 1-1) at 8). Plaintiff alleges that on October 30,
5 2015, an Officer Foresberg, along with other members of the NLVPD, broke open the door of his
6 apartment. *Id.* Upon entering, they allegedly threw two grenades, fired weapons, and killed his dog.
7 *Id.* Plaintiff further alleges that NLVPD searched his apartment for guns and drugs, but found none.
8 *Id.* at 4. According to Plaintiff, he was never provided with a search warrant or given Miranda
9 warnings, and was taken to jail while the search was still in progress. *Id.* at 8. According to
10 Plaintiff, he was later charged with transportation of schedule 1 and 2 narcotics. *Id.* at 4. Finally,
11 Plaintiff alleges that all his personal property is missing, specifically including a 1997 20-foot
12 recreational vehicle, a 2006 F-150 pick-up truck, and an 18-foot utility trailer. *Id.* at 5.

13 Based on these allegations, Plaintiff now brings a complaint under 42 U.S.C. § 1983 against
14 Officer Foresberg, the NLVPD, and the State of Nevada for illegal search, lack of evidence,
15 wrongful incarceration, and missing property. Plaintiff also brings a claim for emotional stress. He
16 seeks return of all his property, and \$750,000 in compensation.

17 **1. 42 U.S.C. § 1983 Claims**

18 To bring a claim under § 1983, a plaintiff must plead that the named defendant (1) acted
19 "under color of state law" and (2) "deprived the plaintiff of rights secured by the Constitution or
20 federal statutes." *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir. 1986); *see also Long v. County of*
21 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). Persons acting under color of state law typically
22 include officials who in some capacity represent either the state, city, or county government. *See*
23 *Monroe v. Pape*, 365 U.S. 167 (1961), *partially overruled on other grounds by Monell v.*
24 *Department of Social Services of City of New York*, 436 U.S. 658, 663 (1978). However, states are
25 not persons for purposes of § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69
26 (1997); *Hale v. Arizona*, 993 F.2d 1387, 1398 (9th Cir. 1993) (en banc). Section 1983 claims against
27 states, therefore, are legally frivolous. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989),
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1 *superseded by statute on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir.
2 2000) (en banc). Further, “[a] government entity may not be held liable under 42 U.S.C. § 1983,
3 unless a policy, practice, or custom of the entity can be shown to be a moving force behind a
4 violation of constitutional rights.” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011).

5 Plaintiff names Officer Foresberg, the NLVPD, and the state of Nevada as Defendants in this
6 case. Plaintiff has not alleged that the officers who searched his house were acting under a policy,
7 practice, or custom of any government entity. The Court will therefore dismiss all § 1983 claims
8 against the state of Nevada and the NLVPD. However, Plaintiff’s claims against Officer Foresberg
9 do satisfy the first requirement of § 1983, as it appears from the complaint that Officer Foresberg
10 was a person acting in his official capacity as a member of the NLVPD.

11 As for the second requirement of a § 1983 claim, Plaintiff must allege a deprivation of
12 constitutional rights, or a right guaranteed by federal statute. Section 1983 does not create any
13 substantive rights. Rather, “it simply acts as an instruction for vindicating federal rights conferred
14 elsewhere.” *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 616 (1979). Here, Plaintiff’s
15 § 1983 claims address the search of his apartment, his arrest, and finally his loss of property. The
16 Court will address the search and arrest first.

17 Plaintiff offers a conclusory allegation that the NLVPD search of his apartment and his
18 subsequent arrest were illegal. His only support for this are that he was not shown a copy of the
19 search warrant and that he was not given a Miranda warning. Plaintiff does not allege that police did
20 not have a search warrant, or that it was invalid, or that police did not have probable cause for an
21 arrest. While the Court accepts Plaintiff’s allegations that he was not given a Miranda warning for
22 purposes of screening, the failure to Mirandize a suspect by itself does not implicate any
23 constitutional concerns unless the suspect also makes incriminating statements while under custodial
24 interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966). However, Plaintiff does not allege that
25 he made any incriminating statements to police. Similarly, Plaintiff’s allegation that NLVPD did not
26 show him the search warrant does not by itself implicate any constitutional right. The Court
27 therefore find that Plaintiff’s has failed to state any valid § 1983 claim regarding the search of his
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1 apartment or his arrest.

2 As for Plaintiff's other § 1983 claims, he alleges that he is missing all his personal property,
3 and that his dog was killed by NVLPD. Plaintiff does not allege that NLVPD ever took possession
4 of his property, or that they currently possess it, or explain how the property otherwise became
5 missing. Absent further detail from Plaintiff, the Court cannot speculate as to what, if any,
6 constitutional rights he has been deprived of with regard to this missing property. The Court will
7 therefore dismiss his § 1983 claims for unspecified missing property, as well as the truck, trailer and
8 recreational vehicle. The only remaining aspect of Plaintiff's § 1983 claims pertain to his dog.

9 The Ninth Circuit has recognized that unnecessary destruction of property in the course of
10 executing a warrant is unconstitutional, and that the killing of a person's dog constitutes an
11 unconstitutional destruction of property absent a sufficiently compelling public interest. *See San*
12 *Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977 (9th Cir. 2005).
13 Destruction of property is unnecessary when "less intrusive, or less destructive, alternatives exist."
14 *Id.* Therefore, construing the complaint liberally and viewing all allegations of fact in the light most
15 favorable to Plaintiff, the shooting and killing of Plaintiff's dog during the search of the apartment
16 implicates Plaintiff's constitutional rights. It also appears, based on the complaint, that Officer
17 Foresberg was acting under color of law during the search. Plaintiff has therefore made a cognizable
18 claim under 42 U.S.C. § 1983 against Officer Foresberg for deprivation of his constitutional rights
19 pertaining to his dog.

20 **2. Emotional Stress**

21 The Court construes Plaintiff's claim of "emotional stress" as a claim for intentional
22 infliction of emotional distress. To recover on such a claim, a plaintiff must establish the following:
23 "1) that the defendant's conduct was extreme and outrageous; (2) that the defendant either intended
24 or recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered
25 severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately
26 caused the distress. *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1145 (1983). Assuming all facts
27 alleged in the complaint to be true, Plaintiff could plausibly establish that shooting his dog was an
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1 extreme or outrageous act, committed intentionally or recklessly. However, Plaintiff does not allege
2 that he has suffered any emotional distress stemming from Defendants' conduct. The Court
3 therefore finds that Plaintiff's complaint does not contain sufficient factual matter to state a plausible
4 claim for intentional infliction of emotional distress. The Court will dismiss this claim.

5 **V. Conclusion**

6 Upon review, the Court approves Plaintiff's *in forma pauperis* status. This action may
7 proceed without Plaintiff paying a filing fee. The Court finds that Plaintiff states a cognizable
8 § 1983 claim against Officer Foresberg for killing his dog, but not against the other named
9 Defendants. All other § 1983 claims fail to state a claim for which relief can be granted, and the
10 Court recommends these claims be dismissed with leave to amend. Plaintiff's claim of emotional
11 stress also fails to state a claim for which relief can be granted, and the Court recommends it too be
12 dismissed with leave to amend. If Plaintiff is given leave to amend, he may amend his original
13 complaint if he believes he can correct the noted deficiencies.

14 If Plaintiff chooses to file an amended complaint, the document must be titled "Amended
15 Complaint." The amended complaint must contain a short and plain statement describing the date
16 and nature of the incident at issue, the parties involved, and the facts demonstrating that his civil
17 rights were violated. Although the Federal Rules of Civil Procedure adopt a flexible pleading
18 standard, Plaintiff still must give Defendants fair notice of the reasons Plaintiff claims they violated
19 his civil rights.

20 Additionally, Plaintiff is advised that if he files an amended complaint, the original complaint
21 (ECF No. 1-1) no longer serves any function in this case. As such, the amended complaint must be
22 complete in and of itself without reference to prior pleadings or other documents. The court cannot
23 refer to a prior pleading or other documents to make Plaintiff's amended complaint complete.

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1 IT IS THEREFORE ORDERED that Plaintiff's application for leave to proceed *in forma*
2 *pauperis* (ECF No. 5) is GRANTED. Plaintiff will not be required to pay an initial installment fee
3 and is permitted to maintain this action to conclusion without prepaying fees or costs or giving
4 security for them. However, under 28 U.S.C. § 1915(b), Plaintiff will be required to make
5 installment payments toward the full \$350.00 filing fee when he has funds available. This order does
6 not extend to the issuance of subpoenas at government expense.

7 IT IS FURTHER ORDERED that under 28 U.S.C. § 1915(b), the Clark County Detention
8 Center must pay to the Clerk of the United States District Court, District of Nevada, 20% of the
9 preceding month's deposits to the account of Plaintiff Leland Watkins #5053918, in the months that
10 the account exceeds \$10.00, until the \$350.00 filing fee has been paid for this case. If Plaintiff
11 should be transferred and become under the care of the Nevada Department of Corrections, the
12 CCDC Accounting Supervisor is directed to send a copy of this order to the attention of the Chief of
13 Inmate Services for the Nevada Department of Corrections, P.O. Box 7011, Carson City, NV 89702,
14 indicating the amount that Plaintiff has paid toward his filing fee, so that funds may continue to be
15 deducted from Plaintiff's account. The Clerk must send a copy of this order to the CCDC
16 Accounting Supervisor, 330 S. Casino Center Blvd., Las Vegas, NV 89101.

17 IT IS FURTHER ORDERED that if this action is dismissed or is otherwise unsuccessful, the
18 full \$350.00 filing fee is still due under 28 U.S.C. § 1915.

19 IT IS FURTHER ORDERED that the Clerk of the Court must file Plaintiff's complaint (ECF
20 No. 1-1).

21 IT IS RECOMMENDED that all claims against the State of Nevada be DISMISSED without
22 leave to amend as amendment would be futile.

23 IT IS FURTHER RECOMMENDED that all claims against the State of Nevada be
24 DISMISSED without prejudice for failure to state a claim upon which relief can be granted, with
25 leave to amend.

26 IT IS FURTHER RECOMMENDED that the claims against Defendant Officer Foresberg for
27 illegal search, lack of evidence, wrongful incarceration, missing property, and emotional stress be
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1 DISMISSED without prejudice for failure to state a claim upon which relief can be granted, with
2 leave to amend.

3 IT IS FURTHER RECOMMENDED that if Plaintiff chooses not to file an amended
4 complaint, this case will proceed only on Plaintiff's § 1983 claim against Officer Foresberg for
5 killing his dog.

6 IT IS FURTHER RECOMMENDED that the court set a deadline for Plaintiff to file an
7 amended complaint.

8 **NOTICE**

9 This report and recommendation is submitted to the United States district judge assigned to
10 this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may
11 file a written objection supported by points and authorities within fourteen days of being served with
12 this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive
13 the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

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15 DATED: April 25, 2017.

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18 C.W. Hoffman, Jr.
19 United States Magistrate Judge
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